

**In the
Supreme Court of the United States**

CHESTNUT HILL SOUND INC.,

Petitioner,

v.

APPLE INC.,

Respondent.

**On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an appeal from an *inter partes* review decision of unpatentability, a losing Patent Owner-Appellant is more than three times as likely to receive a one-word summary affirmation than a losing Petitioner-Appellant. The Federal Circuit issues these one-word summary affirmations under Federal Circuit Rule 36.

This Court has already requested briefing on a related question regarding Federal Circuit Rule 36(e) in *Straight Path IP Group, LLC v. Apple Inc., et al.*, Sup. Ct. No 19-253. The Questions Presented below address disparities of outcomes for Patent Owners versus Petitioners, but they may be considered companion issues.

1. Can a court ever choose to write reasoned opinions for one class of losing appellants and not another under the Due Process and Equal Protection Clauses; and if so, how disparate can the issuance rates of reasoned opinions, versus summary affirmations, be for different classes of appellants?
2. Is the Public entitled to reasoned opinions when the absence of those opinions diminishes the Public's right of access to the courts and ultimately results in the erosion of the Rule of Law?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Chestnut Hill Sound Inc. states that it has no parent company, subsidiary, or affiliate, and that no publicly listed corporation owns 10% or greater of its stock.

PARTIES TO THE PROCEEDING

Petitioner and Appellant Below

Chestnut Hill Sound Inc.

Respondent and Appellee Below

Apple Inc.

Intervenor

Andrei Iancu
Director, U.S. Patent and Trademark Office

LIST OF PROCEEDINGS

United States Court of Appeals for the Federal Circuit

No. 2018-1163

Chestnut Hill Sound Inc., Appellant, v.

Apple Inc., Appellee;

*Andrei Iancu, Under Secretary of Commerce for
Intellectual Property and Director of the United
States Patent and Trademark Office*, Intervenor

Decision Date: July 31, 2019

United States Patent and Trademark Office

Case IPR2016-00794

Patent 8,090,309 B2

Apple Inc., Petitioner v.

Chestnut Hill Sound Inc., Patent Owner

Decision Date: September 5, 2017

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PETITION FOR WRIT OF CERTIORARI

Patent Owner-Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The proceedings identified below are directly related to the above-captioned case in this Court.

Chestnut Hill Sound Inc. v. Apple Inc., No. 2018-1163, 774 Fed. Appx. 676 (Fed. Cir. July 31, 2019), reproduced below in the Appendix at App.1a.

Apple Inc. v. Chestnut Hill Sound Inc., Case IPR 2016-00794, (PTAB September 5, 2017), reproduced below in the Appendix at App.3a.

JURISDICTION

The United States Court of Appeals for the Federal Circuit affirmed the decision of the Patent Trial and Appeal Board on July 31, 2019. App.1a. This Court has jurisdiction to review cases from the Federal Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULES OF PROCEDURE

Federal Circuit Rule 36 (“Rule 36”) states, in part that “[t]he court may enter a judgment of affirmance without opinion” under prescribed conditions of law or fact when the “opinion would have no precedential value.”

STATEMENT OF THE CASE

In 2001 Apple introduced the iPod. It was revolutionary at the time, and the base model could hold up to 5 gigabytes of music. For perspective, the iPhone—which also can be utilized as a music player—would not be released until 2007. In 2004, Chestnut Hill Sound Inc. (“Chestnut Hill” or “the Patent Owner”) recognized that for all its versatility, the iPod had its limitations. The iPod was designed as a portable music player which made it difficult to incorporate into an integrated, easy to use media system. A user could access music on his or her iPod, or in iTunes on his or her computer. But media content that was not stored on an iPod could not be accessed through the iPod, and manually changing between various media collections was difficult and time-consuming. In response to this need, Chestnut Hill’s vision was to incorporate the iPod into a larger media system, to allow access and playback from multiple media libraries to multiple different outputs, and to provide easy transitions between content from a variety of sources and locations.

Chestnut Hill’s first product implementation of this vision was its George™ audio system. George embodied aspects of Patent Owner’s U.S. Patent No. 8,090,309 (“the ’309 Patent”), and solved the problems of accessibility and utility that the iPod did not.

In October of 2004, Chestnut Hill, after filing its provisional patent application, negotiated a confidential disclosure agreement with Apple and then discussed its idea for George, explaining that it worked with Apple’s iPod to provide a digital audio system which accessed both the iPod and remote content for use in

an entire home or office. George could be controlled from a single, easy to use bi-directional remote control. Chestnut Hill performed demonstrations, disclosed its materials, and permitted Apple to take possession of the prototype in multiple meetings and visits with Apple in 2005. George was achieving commercial success after its introduction in 2007, and it was widely distributed through Apple's stores and other retailers like Best Buy.

More than a year after the discussions between Apple and Chestnut Hill were initiated, Apple filed the patent, "Portable media player as a low power remote control and method thereof." U.S. Patent No. 7,702,279, filed December 20, 2005 ("the Ko Patent"). The Ko Patent claimed very similar operations and mechanics to the '309 Patent. As examples, both the Ko Patent and the '309 Patent disclose using one device to control local and remote content, both the Ko Patent and the '309 Patent enable access to remote content wirelessly or over a network, and both the Ko Patent and the '309 Patent are operable in two modes.

During the examination of the '309 Patent, the examiner considered the '309 application and the Ko Patent to be so similar, that the Ko Patent was cited as an anticipatory reference against the '309 Patent. In other words, in the eyes of the Patent Office Ko disclosed the same invention as the '309 Patent.

While the '309 Patent was making its way through the Patent Office, Apple continued to sell George in its stores until 2008. Then, in the same year that Apple discontinued sales of George, it released its "Remote" application. The Remote application provides the programming and usage functionality of the '309 Patent.

Ultimately, Chestnut Hill sued Apple for infringement of the '309 Patent, as well as for infringement of the related U.S. Patent No. 8,725,063 (“the '063 Patent”).

In response, Apple filed four *inter partes* review (“IPR”) proceedings,¹ collectively, against the '309 Patent and the '063 Patents before the Patent Trial and Appeal Board (“PTAB”) of the Patent and Trademark Office (“PTO” or “Patent Office”). One of those proceedings is the origin of this petition. Both patents were found to be unpatentable by the PTAB, but the proceedings occurred at different times. The '063 Patent was disposed of first, IPR2015-01465, and proceeded to an appeal before the Federal Circuit. After full briefing and oral argument the Federal Circuit issued a one-word affirmation of the PTAB’s opinion, finding the '063 Patent unpatentable.

Chestnut Hill continued its appeal of the PTAB’s decision in the '309, but without the guidance on the '063 Patent that a reasoned opinion from the Federal Circuit could have provided. In the appeal of the PTAB’s decision on the '309 Patent, Chestnut Hill raised two arguments in support of the merits of the patent itself: (1) no known method was cited, by Apple or the PTAB, for combining the cited references, nor was there evidence of a motivation to do so that would result in the '309 Patent claims, and (2) the Ko Patent was strong evidence of nonobviousness (the facts of which are discussed, above). Chestnut Hill also argued that because the issuance of the '309 Patent was delayed, and it was granted a 928 day patent term

¹ *Inter partes* review proceedings were created by the Leahy-Smith America Invents Act.

adjustment, it should be considered a pre-AIA patent, and not subject to the PTAB's jurisdiction in an IPR. The Federal Circuit did confirm its jurisdiction in the face of this argument.

In support of its combinations argument, Chestnut Hill particularly pointed out that neither the PTAB nor Apple identified a known method to support combining the references. Apple's expert, during his deposition, was asked to identify the known method that he relied upon in his report. The response, generally discussing synthesis and what exists in one's mind, was devoid of any actual known method:

Q. [BY MR. HAMAD] Can you identify for me in paragraph 26 the known methods that you mention in the first sentence of paragraph 26?²

A. [BY DR. MERCER] Yes, I think I can. So what's really being said there, as I think about it, is you have two sets of ideas. Those exist in the mind, a single person, probably, or a team, but those are minds—it's a mind or minds of ordinary skill in the art.

And then, the point is, there is—there's a process of synthesis with respect to any kind of—of creation, and one common way that synthesis occurs is to take ideas and to put those ideas together or parts of those ideas together to accomplish something that's

² The first sentence of Paragraph 26 was the only portion of the expert's declaration which discussed any methods of combining the pertinent references.

different than either one of those ideas by themselves.

In its responsive briefing, Apple objected that Chestnut Hill had read the relevant paragraph (paragraph 26) in isolation, and the Federal Circuit should look to the surrounding paragraphs (25 and 27) to understand the known method. This was consistent with the PTAB's opinion. Neither the PTAB nor Apple identified a known method in those paragraphs, or anywhere in the record.

The other paragraphs of the deposition, in summary, state that it would have been obvious to combine the cited references to achieve the functionality of the '309 Patent (paragraph 25) and that the results of combining the cited references would have been predictable (paragraph 27). The PTAB relied upon these paragraphs, and Apple referenced these same paragraphs rather than identifying an actual known method in the record.

Chestnut Hill also appealed on the grounds that there was no motivation to combine the cited references. While Apple had identified several reasons to improve the performance of the system, none of them was a catalyst to the specific combination which was the '309 Patent. Without some non-hindsight evidence that there was a reason to put these cited art references together to achieve the claims of the '309 Patent, the PTAB's opinion could not have been upheld.

The Federal Circuit disposed of the appeal of the '309 decision by only stating: Affirmed.

REASONS FOR GRANTING THE PETITION

To paraphrase Nelson Mandela: you either win, or you learn. Opinions written when an appellant is unsuccessful are particularly important to the losing appellant, and also to other similarly situated litigants. The Federal Circuit is writing reasoned opinions for losing Petitioner-Appellants³ at a significantly higher rate than it writes reasoned opinions for losing Patent Owner-Appellants. Specifically, a losing Patent Owner-Appellant is more than three times as likely to receive a Rule 36 summary affirmation⁴ than a losing Petitioner-Appellant.⁵ This is to the benefit of the Petitioner-

³ Petitioner-Appellant refers to the Petitioner challenging the patent in an IPR, and then appealing to the Federal Circuit, not the Petitioner before this Court.

⁴ The actual rate is closer to 3.6. This was based on statistics compiled by Larry Sandell, *What Statistical Analysis Reveals About Winning IPR Appeals*, LAW360 (August 8, 2019, 5:22 PM), <http://www.meimark.com/wp-content/themes/meimark/imgs/Law360-What-Statistical-Analysis-Reveals-About-Winning-IPR-Appeals.pdf> (reviewing appeals of unpatentability decisions from the PTAB through August 8, 2019).

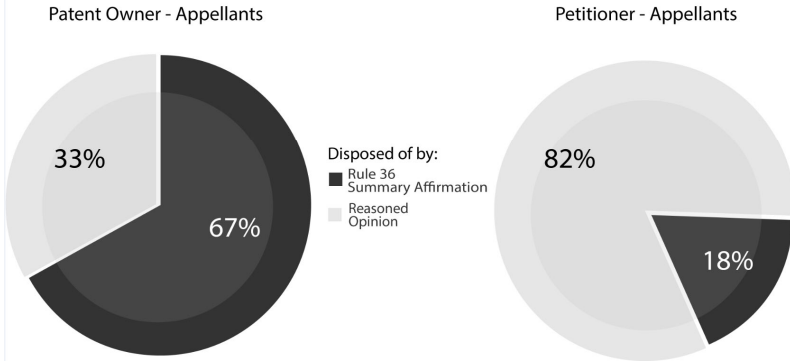
Sandell states that for losing Patent Owner Appellants two-thirds of “affirmances of unpatentability [are] being made under Rule 36.” In contrast, Sandell goes on to write that for Petitioner-Appellants “about 18% of the total petitioner appeals . . . were pursuant to Rule 36.”

Since a losing Patent Owner-Appellant has a 66% chance of receiving a Rule 36 opinion, and a losing Petitioner-Appellant has an 18% chance of receiving a Rule 36 opinion, a Patent Owner-Appellant is 3.6 times as likely to receive a one-word affirmation than a Petitioner-Appellant.

⁵ On a more granular level, a survey by Petitioner conducted from January 2019 through September 2019 found that on a patent by patent analysis of appeals from the PTAB (versus the case by

Appellants and to the detriment of the Patent Owner-Appellants, and it simply seems unfair.

Disposition of Losing Unpatentability Appeals



Under the Equal Protection and Due Process Clauses, a parity of procedural outcomes extends to all similarly situated litigants, and patent appellants should not be treated disparately based on whether they are Patent Owners-Appellants or Petitioner-Appellants. U.S. Const. amend. V, and amend. XIV, § 1. The Court is bound to offer appellants the same procedure, even if appellants are not guaranteed any particular substantive result. This result affects not merely the Patent Owner-Appellant by guaranteeing equal opportunities to make economic and legal decisions, but also guarantees the Public’s faith in the judiciary and the Rule of Law.

case basis in Sandell’s analysis), about 90% of all patents which were disposed of through Rule 36 were from appeals by Patent Owner. Only 10% of the patents disposed of by Rule 36 opinions were from appeals brought by Petitioners.

I. DIFFERENT PROCEDURAL OUTCOMES FOR SIMILARLY SITUATED APPELLANTS VIOLATE THE PETITION, EQUAL PROTECTION, AND DUE PROCESS CLAUSES, HARMING PATENT OWNER-APPELLANTS' ECONOMIC AND LEGAL INTERESTS.

A. Unequal issuance of reasoned opinions offends the Due Process and Equal Protection Clauses.

If a court wrote reasoned opinions for all losing appellants, and never for losing appellees, then the principles of fairness underpinning the Equal Protection and Due Process Clauses would be offended. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886) (“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered . . . with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution.”). While the distribution of opinions may not always be exactly equal, there must be some parity. As an example, both sides should get opinions approximately 75% of the time, or approximately 50% of the time. But regardless of the exact frequency, the frequencies should be comparable.

These unequal circumstances raise two questions, extending beyond patent law, which the Court should resolve: (1) can different classes of appellants receive different procedural treatment from the court, and (2) does the court owe a broader duty to the Public to provide reasoned opinions? The answers to these questions—and the rising frequency of Rule 36 summary affirmations—affect patent owners and petitioners, and also the Public. Patent owners and applicants experience a real injury, while the Public suffers a loss both in the body of law and the Rule of Law.

B. Access to the courts is a fundamental right, entitled to heightened protections.

The Petition Clause grants litigants such as Patent Owner-Appellants the right, initially, to access to the courts. U.S. Const. amend. I; *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) (“[T]he right to petition extends to all departments of the Government.”). The right of access is a fundamental right, entitled to heightened protections under the Due Process and Equal Protection Clauses. *Marbury v. Madison*, 5 U.S. 137 (1803). Once that right to access is granted, it should be treated in accordance with the Equal Protection and Due Process Clauses. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L. REV. 557, 645 (1999) (“Once the government allows a plaintiff to file his claim and thereby assumes control over its disposition, however, it must do so fairly and reasonably—in other words, afford due process.”). Anything “which might invade or restrain [a fundamental right] must be closely scrutinized and carefully confined.” *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966). Litigants are entitled to petition the courts under equal procedural rules.

While the issue of treatment of an appellate right after it is first granted appears to be one of first impressions, the Court’s jurisprudence in examining the nature of the life of other fundamental rights is directly applicable here. In particular, the Court’s analysis of voting rights is helpful to understand the constitutional underpinnings of where the Petition Clause begins and where it should end. The theme

in those cases, applicable here, is that once the right to vote is granted, it cannot be devalued by later government acts:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.

Bush v. Gore, 531 U.S. 98, 104-105 (2000). It is this concept: that once granted a right, that right must be apportioned equally between all recipients, which should be applied here. Subsequent restrictions on the Petition Clause are constitutionally infirm. An appeal that ends in a reasoned decision is not equivalent to one that ends as merely "Affirmed." This is consistent with the Court's voting jurisprudence.

As an example, the Court has evaluated the constitutionality of poll taxes, and the state's weighing of votes differently based upon a voter's race, gender, or domicile. *See, e.g., Harper*, 383 U.S. 663 (determining that a poll tax is unconstitutional); *Gray v. Sanders*, 372 U.S. 368 (1963) (rejecting the premise that votes could be weighted differently and collecting cases regarding the same). In both cases there was not an outright prohibition against a particular class of voters, rather there was an impediment blocking that certain class of voters from exercising their vote or diluting the value of the vote once it was cast.

Just as it should here, the *Harper* Court flatly rejected attempts by states to alter the weight or accessibility of the vote after it is granted: "Once the

franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” *Harper*, 383 U.S. at 664. The Court further reasoned that the Constitution does not favor one class of individuals over another: “we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.” *Gray*, 372 U.S. at 380. This equality does not end with filing a lawsuit or an appeal.

In rejecting the state’s dilution of the value of urban votes versus rural votes, the *Gray* Court noted that the idea of political equality in the Fifteenth Amendment extended to all phases of state elections. *Id.* (evaluating a state statute which devalued votes through a system similar to the electoral college). The Court further noted that this concept of political equality was a thread woven through the Declaration of Independence, the Constitution, and even the Gettysburg Address. *Id.* at 381. This extends to all fundamental rights granted under the Constitution, and the Petition Clause is also subject to this jurisprudence of continuing equal treatment.

The right to an appeal, much like the right to vote, must be maintained after its initial grant. Here, appellate courts are subverting the intent of the Petition Clause after the initial appeal is filed by refusing to write reasoned opinions in many cases. The right to vote and the right to an appeal are not merely gateways through which a voter or appellant passes; these rights are a continuing process which must yield the same procedural outcome for all stakeholders. The right to petition—here embodied by the right to receive

a reasoned opinion—“can be denied by a debasement or dilution . . . just as effectively as by wholly prohibiting the free exercise of the [right].” *Bush*, 531 U.S. at 104-105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). The Federal Court’s practice of issuing Rule 36 does not comport with the Court’s jurisprudence and should be declared unconstitutional.

Notably, unlike an appeal from a district court, an appeal from a PTAB opinion represents the first instance that a Patent Owner is entering an Article III court on the issues raised in the IPR. This is the first time for an Article III court to opine. Appellants that appeal district court decisions have already had an Article III determination. This denial of procedural consistency between appellants from the PTAB versus from the district courts is yet another disparate treatment of Patent Owner-Appellants, and a violation of the Due Process and Equal Protection Clauses.

C. The Federal Circuit’s application of Rule 36 does not withstand strict scrutiny.

The Petition Clause provides appellants with the right to petition the government for redress. U.S. Const. amend I. The right to petition is enshrined in the Constitution as a fundamental right and includes the right to access the courts. *See, e.g., California Motor Transport Co.*, 404 U.S. at 510 (“The right of access to the courts is indeed but one aspect of the right of petition.”); *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (“The right of petition is one of the freedoms protected by the Bill of Rights.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (“[T]he key to discovering whether a [right] is “fundamental”. . . “lies

in assessing whether [the] right [is] explicitly or implicitly guaranteed by the Constitution.”).

The Federal Circuit impermissibly denies Patent Owner-Appellants their fundamental right to access to the courts when it favors Petitioner-Appellants with reasoned decisions more than Patent Owner-Appellants. This unequal treatment must be “closely scrutinized and carefully confined.” *Harper*, 383 U.S. at 670 (noting high level of scrutiny for fundamental rights). To survive this scrutiny, the unequal apportionment of reasoned opinions must be “narrowly tailored to achieve a compelling government interest.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (internal citations omitted). Any concerns of judicial economy which may be raised to support the use of Rule 36 opinions as a docket control measure are unpersuasive.

D. Judicial economy does not trump the fundamental rights of Patent Owner-Appellants to well-reasoned opinions under the Petition Clause.

Because the Petition Clause enshrines a fundamental right, any restrictions to it are subject to strict scrutiny, and cannot be limited absent a compelling government interest. *NAACP v. Button*, 371 U.S. 415, 438-44 (1963). It is an open question whether summary dispositions are valid at all, but there is not a valid reason to use this tool against Patent Owners more often than Petitioners. “[A]lthough efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency.” *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (citations omitted).

Indeed the text of the Declaration of Independence itself implies that a Petition for Redress is due some sort of answer. Referencing King George it states: “In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.” (Emphasis added). As described herein, summary affirmations offer nothing but repeated injury—offensive since the birth of the country—to both Patent Owners and the Public.

Arguably, the courts may have valid reasons for wishing not to opine on every case, including reasons of judicial economy or the predictable outcome of an appeal; however, these reasons do not justify issuing a decision without a reasoned order:

[T]he remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000) (later vacated as moot).

Any judicially imposed “institutional restrictions [should] reflect considered policy judgments.” Andrews, *supra*, at 673. The Federal Circuit’s application of Rule 36 does not reflect a balancing of the interests of various stakeholders. “Federal appellate courts’ twin duties are to decide appeals and to articulate the law.” *United States v. McFarland*, 311 F.3d 376, 417 (5th Cir. 2002) (Jones, J., dissenting from the denial of a

rehearing en banc, with whom Judges Jolly, Smith, DeMoss, and Clement join). The losses stemming from unwritten opinions extend beyond patent stakeholders, and ripple out into the Public's perception of the Federal Circuit, generally. Ultimately, no concerns of judicial economy are compelling enough to outweigh the stakeholder's and the Public's interests in discovering the universal norms applicable to all litigants.

Less restrictive means of reaching the same docket control measures could include: the executive branch appointing more jurists; the legislature allocating more funding or streamlining confirmation hearings; or the judiciary writing reasoned, but shorter, opinions. Appellants who do not receive opinions have no real redress. In the face of the judiciary, they have no true power once they have been disposed of by an appellate court. When appellate courts decline to issue opinions, they "set aside justice and invite us to speak of expediency." Michael C. Dorf, *Prediction and the Rule of Law*, at 42 *UCLA LAW REVIEW* 651, 679 (1995) (quoting 2 THUCYDIDES, *THE PELOPONNESIAN WAR* at 167-77 (Benjamin Jowett trans., 2d ed. 1900)).⁶ Even if this Court should determine that the Federal Circuit and other courts might utilize summary affirmations as a docket-control measure, this exercise of judicial discretion should still be applied even-handedly to all classes of litigants. There should be reasonable parity in decisions issued to Patent Owner-Appellants and Petitioner-Appellants.

⁶ Available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1107&context=facpub>.

E. Rule 36 opinions economically and legally harm Patent Owner-Appellants, leaving them at a disadvantage relative to Petitioner-Appellants.

Without reasoned opinions on unsuccessful appeals, Patent Owners are substantially impaired both in the management of their economic affairs, and also in their ability to make meaningful legal decisions. Rule 36 opinions offer a Patent Owner no counsel regarding deficiencies in the patent-in-suit—which affects prosecution and related business decisions. Nor do Rule 36 opinions offer counsel as to why the legal arguments supporting the appeal were unsuccessful.

a. Patent Owner-Appellants cannot make informed economic decisions without well-reasoned opinions.

The use of Rule 36 opinions to dispose of appeals affects more than just the immediate litigation. The patent-in-suit often does not stand alone; a Rule 36 affirmation harms a larger family or portfolio. The '309 Patent is part of a larger family, with 10 issued patents and one pending patent application. There is no counsel from the Federal Circuit which can be incorporated into the prosecution of the pending application. And this is a small family. According to one survey, the average portfolio size of a patent family in the United States is about 63 related patents. Francois P. Kabore and Walter G. Park, *Can Patent Family Size and Composition Signal Patent Value?* at 7 (internal citations omitted).⁷ Reasoned

⁷ Available at <https://doi.org/10.1080/00036846.2019.1624914>.

opinions teach Patent Owners what mistakes they made in the prosecution of the patent-in-suit, and affect the ongoing treatment of the larger portfolio.

Many times, although one patent is lost, another patent or pending application can be saved with timely amendments more clearly claiming the invention. Without the direct feedback of a Federal Circuit opinion, these deficiencies—and potential corrections—remain hidden. Reasoned opinions provided to losing Patent Owner-Appellants provide particularized, specific information. A reasoned opinion in the '063 appeal, or even in this appeal, would affect the remaining application, and influence Chestnut Hill's future licensing and patenting strategies. As with George, the absence of a meaningful opinion can even affect manufacturing decisions. Informed decisions of individual Patent Owners in turn affect the larger economy.

Recent statistics show that new filings of patent applications in the United States have dropped. United States Patent and Trademark Office Performance and Accountability Report, FY2018 at 32.⁸ This indicates that Rule 36 opinions may also be affecting the country's atmosphere of innovation. Researchers frequently rely on the filing of new patents as an indicator of innovation. *Eleven Facts about Innovation and Patents*, at 2 (“[P]atent counts are one of the most commonly used proxies for innovation”) (internal citations omitted).⁹ In the

⁸ Available at <https://www.uspto.gov/sites/default/files/documents/USPTOFY18PAR.pdf>.

⁹ Available at https://www.brookings.edu/wp-content/uploads/2017/12/thp_20171213_eleven_facts_innovation_patents.pdf.

same survey, it was found that 30% of the studied patents were filed in not only the United States, but also Japan and the European Patent Office. *Id.* at 8. Consequently, when a patent is invalidated it affects the Patent Owner's other intellectual property interests domestically and abroad. It is difficult to predict the long-lasting effects of this trend on the U.S. technology market, and the larger economy. But it is likely that if the climate for Patent Owners continues to be unfavorable, more and more technology innovators will move their endeavors overseas.

While the PTAB provides some opinions, these opinions are insufficient. The goal of an opinion is “to show how like cases are properly to be decided in the future.” *County of Los Angeles v. Kling*, 474 U.S. 936, 940 n. 6 (1985) (Stevens, J., dissenting) (quoting K. Llewellyn, *The Common Law Tradition* 26 (1960)). PTAB opinions are not always a reliable indicator of how cases should be decided, nor are PTAB opinions always well-reasoned. The Federal Circuit has repeatedly noted that the PTAB does not show its work. *E.g.*, *BASF Corp. v. Enthone, Inc.*, 749 Fed. Appx. 978 (Fed. Cir. 2018) (unpublished); *Emerson Elec. Co. v. SIPCO, LLC*, 745 Fed. Appx. 369 (Fed. Cir. 2018) (unpublished); *Arista Networks, Inc. v. Cisco Sys., Inc.*, 726 Fed. Appx. 787 (Fed. Cir. 2018) (unpublished). Patent Owners complaining of this very problem—that the PTAB does not show its work—will find little to no instruction from the summary affirmation of a logically or factually insufficient PTAB opinion.

If the Federal Circuit continues to favor losing Petitioner-Appellants with more reasoned opinions then the arguments of the Petitioner-Appellants will

continue to improve. Patent Owner-Appellants, operating without any feedback from the Federal Circuit, will continue to operate “in the dark.” This result is only exacerbated as the PTAB may entirely misconstrue what the Federal Circuit thought of its logic and their reasoning. The disadvantage suffered by Patent-Owner Appellants causes real, economic injuries. This disparity between appellants is impermissible under the Due Process and Equal Protection Clauses. The Court should take this issue up for briefing, and determine that all appellants are equally entitled to a reasoned opinion under the Petition Clause.

b. Patent Owner-Appellants can neither effectively petition for rehearing, nor can they successfully petition this Court for appellate review, without well-reasoned opinions.

Additionally, Patent Owners frequently appeal on multiple grounds, both legal and factual. When no opinion is issued, neither a Patent Owner nor anyone else has any way of knowing which of the PTAB’s grounds were correct, or why the Patent Owner-Appellant’s arguments were unpersuasive. The process of the appeal does not necessarily culminate at the Federal Circuit with the issuance of a decision. An appeal should also offer the opportunity for a panel rehearing or a rehearing en banc, in appropriate cases. Federal Circuit Rule 35(a) and (b) require that the petition must assert that either the panel decision (1) is in conflict with Supreme Court or Federal Circuit decisions, or (2) there is a question of “excep-

tional importance.”¹⁰ A Patent-Owner without a reasoned opinion will struggle to demonstrate that it is qualified to request a hearing or rehearing en banc. As one jurist explains, without a reasoned opinion, “in many instances, it is impossible to be sure of the basis of an affirmance; *e.g.*, was a charge unobjected to below correct or was the error merely not ‘plain.’” *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974).

It is possible under Rule 36 that no appellant is entitled to an opinion. If so, that rule must be applied even-handedly to all appellants because while the Court has not evaluated this question in the civil context, it has evaluated a similar question, of entitlement to a second appellate review, in the criminal context. In *Burns v. Ohio* the Court examined an attempt of a prisoner, Burns, to appeal his conviction for burglary. *Burns v. Ohio*, 360 U.S. 252 (1959). Burns had lost his appeal at the Ohio Court of Appeals, and appealed to the Ohio Supreme Court. The Ohio Supreme Court rejected his appeal, accompanied by a pauper’s affidavit, for failing to pay the required filing fee. Defending its procedure, the State argued that because Burns had one appeal already, he was not entitled to another. *Id.*

But this Court viewed the question through a different lens. The Court did not consider whether one appeal was sufficient, but rather whether, if a procedure exists, any given litigant is entitled to the

¹⁰ If a petition does not meet these standards, it “may be deemed frivolous and subject to sanctions.” Fed. Cir. R. 35(a)(2). As a consequence, an appeal from a Rule 36 opinion may not only be futile, but also sanctionable.

benefit of that procedure. Ultimately the Court opined that: “Since the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty.” *Burns*, 360 U.S. at 257 (citations omitted). This logic and conclusion applies here as well: Since the Federal Circuit chooses to issue reasoned opinions which permit rehearing or appeals in some cases, it may not foreclose Patent Owner-Appellants from access to those rehearings or appeals by issuing Rule 36 opinions.

It is also not enough to assert that Patent Owners may rely upon the opinions provided to other losing appellants. Opinions in unrelated cases may be neither relevant nor instructive to Patent Owner-Appellants. As with human families, amongst patent families “All happy families are alike; each unhappy family is unhappy in its own way.” Leo Tolstoy, *Anna Karenina*, Chapter 1, line 1 (1877). The unhappy patent family, which has just lost a member on appeal, is different than every other patent family. Put another way, each time the Federal Circuit writes a reasoned opinion, it is as though a teacher has graded a student’s paper. The comments are particularized to the errors committed by that student. While one student can learn generally from another’s mistakes, it is more instructive to have one’s own mistakes corrected.

The relatively low rate of reasoned opinions issued for losing Patent Owner-Appellants forecloses rehearing or meaningful further appellate review to that class of litigants. Because Patent Owner-Appellants are currently not offered the same opportunities as Petitioner-Appellants, the Court should request briefing on this

matter and find that Federal Circuit Rule 36 is unconstitutional as applied to Patent Owner-Appellants.

II. THE ABSENCE OF REASONED OPINIONS IMPAIRS THE PUBLIC'S FIRST AMENDMENT RIGHT OF ACCESS TO THE COURTS AND ULTIMATELY RESULTS IN THE EROSION OF THE RULE OF LAW.

A. All levels of the judicial and administrative patent system are affected by Rule 36 opinions.

The Public is invested in the fair and measured issuance of reasoned opinions. Reasoned opinions have a direct effect on how patent stakeholders interpret and apply the law. These interpretations lead to changes in behaviors as all parties attempt to read the tea leaves of judicial opinions. Designating an opinion as “non-precedential” does little to forestall these attempts. This information creates a feedback loop between the Federal Circuit and the other patent stakeholders. This feedback loop serves both patent stakeholders and the judiciary and administrative bodies responsible for administering the patent laws. As with this Court, the Federal Circuit issues opinions that are closely read by judges at the PTAB and in district courts, examiners at the PTO, and Patent Owners and Petitioners. At each decision point these patent stakeholders attempt to incorporate these decisions—or the absence of them—into their respective practices. Each set of stakeholders attempts to move closer and closer to the Federal Circuit’s, and this Court’s, decision making principles.

The availability of quality opinions from the Federal Circuit directly relates to the accuracy and quality of patent prosecution, and thus issued patents.

Better prosecution will ideally result in the issuance of better patents that are more likely to be valid from their inception. Issuance of better patents should lead to less litigation, as infringers and challengers look back at existing precedent. These results ultimately conserve the money and time of patent stakeholders, but also the valuable time and resources of the Federal Circuit, the PTO, and district courts. If the feedback loop is broken, then all parties suffer. More money is expended prosecuting patents that are not ultimately upheld as valid, more PTO resources are used examining, perhaps incorrectly, those patents, the district courts and the PTAB are faced with untangling how secret or underdeveloped law should be applied, and the Federal Circuit is inundated with appeals as patent stakeholders struggle to resolve why they have lost.

In the wake of the America Invents Act of 2011 the number of patent litigation cases filed has increased dramatically. *Shambaugh, et al.* at 11, *supra* (“[B]etween 2010 and 2013, the number of cases filed increased by 146 percent.”). Rule 36 may seem like a useful measure to manage this huge uptick, but it ultimately makes the appellate process more difficult. With the passage of only seven years since the effective date of the AIA, the Federal Circuit’s PTAB jurisprudence is still relatively limited. Rule 36 opinions deny the patent community a more robust body of PTAB-related patent law. This is unfortunate as more reasoned opinions would ultimately make outcomes more predictable and lead to a reduction in litigation. This issue is at last ripe for this Court to evaluate: enough time has passed to expose trends in the use of Rule 36, and a decision here can have a meaningful

effect on future opinion-writing, patent prosecution and litigation, and investment in innovation.

B. Non-Precedential decisions often lead to precedential decisions, to the detriment of all.

A shift from the silent nature of a non-precedential decision to precedent already occurs with dicta, especially this Court's dicta, with predictable regularity. Litigants frequently latch onto an explanatory, but not dispositive, comment from an appellate court, and hold it up as the future of that branch of law—which it may eventually become.

Likewise, noticing a “pattern” of Rule 36 decisions upholding the PTAB's application of a particular precedent in a particular way, litigants and panelists may assume that application reflects the Federal Circuit's current interpretation of the law. In reality the Federal Circuit could have decided all of those cases on a plethora of other grounds. But the uncovered “pattern” may then lead to precedential PTAB opinions or district court opinions, and ultimately to Federal Circuit opinions, enshrining the misunderstood “pattern” as good law.

It is not enough for the court to say “I have applied the law and made the right decision.” Without reasoned decisions the stakeholders labor under secret or incorrect understandings of the law that are opaque to the Public. To prevent this result, the Federal Circuit's decisions must be explained. This need for transparency acts to support the Public's belief in the integrity of the Rule of Law in the courts.

C. Silenced dissents undermine developments in the law.

Reasoned opinions also expose dissension or nuances among the courts that may otherwise be hidden. Dissents serve a two-fold process of (1) internal error correction, and (2) revealing areas of the law which may need to change. The loss of unusual or dissenting opinions may represent a loss of intra-panel or intra-court error correction:

One study of unpublished opinions found ‘a surprising number of reversals, dissents, and concurrences. . . . suggesting that panels authoring unpublished opinions reach some results with which other reasonable judges would disagree. . . . Failing to give unpublished opinions precedential effect raises the very specter described by the Eight Circuit: that like cases will be decided in unlike ways.

Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 262 (5th Cir. 2001) (Smith, J., dissenting) (quoting Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 119 (2001) (internal citations omitted)). When forced to explain its reasoning, a panel may be faced with the gaps in its logic, the inconsistent application of precedent, or a dearth of factual support. Forcing a jurist to explain its reasoning may result in the realization that the result is unsupported by the record or the law. Reasoned opinions serve as a gut-check for the jurist crafting the opinion, and should be required if not in all cases, then at least evenly amongst appellants.

The existence of dissents may also reveal a schism in court jurisprudence that is ripe for resolution, either by an en banc decision or by an appeal to this Court. Without an opinion, there is no way for an appellant—or the larger court—to identify these areas where further development is necessary. And the courts, administrative and judicial, are not the only governmental bodies hampered by Rule 36 opinions, the legislature is also affected.

D. Rule 36 opinions hinder the passage of valuable legislation.

Dissents also “have the potential to elucidate needed changes in legal doctrine.” Stefanie A. Lindquist, *Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm*,¹¹ at 4. Beyond the problems within the Article 1 and Article 3 courts and bodies, failure of the Federal Circuit to issue consistent, reasoned opinions also affects the legislature. Patent law, which leads to patent valuation “is also important to policy-makers for assessing the impact of legal provisions or innovation policies on the level and quality of new technologies.” Kabore and Park at 1, *supra* (internal citations omitted).

The legislature, acting on behalf of the Public, relies on Federal Circuit opinions to create new law, and to respond to what it perceives as incorrect or unhelpful trends in existing law. *See, e.g., Patent Reform Act of 2011: Hearing on S. 23*, 112th Cong. S949 (2011) (Senator Leahy discussing generally positive trends in patent law, but noting additional

¹¹ Available at <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf>.

steps are needed to ensure high quality patents). Just as there is a feedback loop between the Federal Circuit and other patent stakeholders in the administrative and judicial frameworks, there is also a feedback loop between the Federal Circuit and Congress. Without reasoned opinions the information flow between these bodies is hampered. These sorts of impediments make corrective legislation difficult and erode Public confidence in the responsiveness of the government as a whole.

E. Rule 36 opinions are harmful to the Rule of Law that underpins our society.

The Public has an interest in a transparent, accurate, and predictable judiciary. These qualities permit citizens to order their affairs, predict outcomes, seek appellate error-correction, and perhaps most importantly, they invest the judiciary with legitimacy and inspire the Public's trust in the system. Writing in the criminal context, this Court has noted that “when the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest.” *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 509 (1984) (relying on T. Reik, *THE COMPULSION TO CONFESS* 288-295, 408 (1959)). Given the Public's interest in transparency, accuracy, and fairness it is difficult to justify disproportionate opinion writing, or no opinion writing at all.

As the Court observes in the criminal context, openness provides to the larger community a “therapeutic value.” See *United States v. Hasting*, 461 U.S.

499, 507 (1983). Reasoned judicial opinions act as an overflow for otherwise disgruntled parties: “When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for [] understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest . . .” *See id.* (quoting Reik, *supra*, at 288-295, 408). This desire for openness is not a desire for perfect accuracy in decision making, but only for the opportunity to observe and accept the results of a case.

Articulating the law permits the public to ensure that “the exercise of state power [is] using, and guided by, published written standards that embody widely-supported social values, avoid particularism, and enjoy broad-based public support.” Michael Johnston, *Good Governance: Rule of Law, Transparency, and Accountability* at 2.12 The Public is generally suspicious of “secret” or unexplained decisions, as decisions without an explanation are made “without the discipline and accountability that the preparation of opinions requires.” *County of Los Angeles*, 474 U.S. at 940 (Stevens, J., dissenting from the Court’s failure to issue opinion).

This suspicion springs not from an assumption that the courts are bad actors, but rather from the sentiment that “people subjected to secret law are especially likely to be mistreated.” *Lian v. Ashcroft*, 379 F.3d 457, 460 (7th Cir. 2004). This idea weaves not only through our case law, promulgation of “a rule

¹² Available at <http://etico.iiep.unesco.org/sites/default/files/unpan010193.pdf>.

spawning a body of secret law—[is] plainly wrong,” *County of Los Angeles*, 474 U.S. at 938 (Stevens, J., dissenting), but also through our culture at large, “[s]ecrecy is the keystone to all tyranny. Not force, but secrecy and censorship.” Robert A. Heinlin, *If This Goes On* (1940). Transparency in decision-making both provides an outlet for injured feelings and reassures the Public feels that its government is not tyrannical.

The Public’s right to reasoned opinions is rooted in its First Amendment rights in the Petition Clause, and from the common law provisions supporting open courts. *Los Angeles County Bar Ass’n v. Eu*, 979 F.2d 697, 705-06 (9th Cir. 1992) (noting that the First Amendment right of petition is one of three sources of the right of court access). Without open access to an equal proportion of losing Patent Owner appeals and losing Petitioner appeals the Public has no way of incorporating the Federal Circuit’s decision making. The Public is also left feeling as though it cannot trust and rely upon the Federal Circuit to generally “get it right.” Ongoing faith in the judiciary is imperative for a country founded on the Rule of Law.

This Court should opine that reasoned opinions are required from the Federal Circuit, or alternatively that Rule 36 should not be applied to disproportionately deprive one class of appellants of reasoned opinions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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